CITY OF PHOENIX,
GRAHAM, FRANK G.,
JOHN J. LONG, MILTON
THERIAS, DR. MORRISON,
and constituting the City Council of the
Arizona,

Appellants,

vs.

EMILY KOLODZIEJSKI,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF ARIZONA

JURISDICTIONAL STATEMENT

ROBERT J. MACHTINGER
City Attorney
City of Phoenix
By ALAN K. FOLEY
Assistant City Attorney
Municipal Building
Phoenix, Arizona 85003
REX E. LEE
Special Counsel
111 W. Monroe
Phoenix, Arizona 85003
Attorneys for Appellants

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Question Presented	5
Statement of the Case	5
The Question Presented is Substantial and Probable Jurisdiction Should Be Noted	7
Conclusion	16
Appendix A — Lower Court's Opinion and Order	17
Appendix B — Lower Court's Judgment	21
Appendix C — Opinion and Judgment in *Dorris Handy, Jr. v. Parish School Board of the Parish of Acadia*	23

TABLE OF AUTHORITIES CITED

CASES: Page

Cipriano v. City of Houma, 395 U.S. 701 (1969)....5, 6, 7, 8, 9, 10, 11, 13, 14, 16

Baker Watts & Co. v. Saxon, 261 F. Supp. 247 (D.D.C. 1966) 8

Dorris Handy, Jr. v. Parish School Board of the Parish of Acadia, No. 31, 923, Fifteenth Judicial District Court, Parish of Acadia, Louisiana (November 19, 1969) 12

STATE CONSTITUTIONS:

Arizona Constitution:
Article 7, Section 13 .....2, 6, 11
Article 9, Section 8 ..... 2, 6

Colorado Constitution, Article XI, Sections 6, 7, and 8 11

Florida Constitution:
Constitution 1885, Article 9, Section 6 11
Constitution 1969, Article 7, Section 12 11

Idaho Constitution, Article 8, Section 3 11

Louisiana Constitution, Article XIV, Section 14(a) 12

Michigan Constitution, Article II, Section 6 12

Montana Constitution:
Article IX, Section 2 12
Article XIII, Section 5 12

New Mexico Constitution, Article IX, Sections 10, 11 and 12 12

Oklahoma Constitution, Article X, Section 27 12

Rhode Island Constitution, Article XXIX, Section 2 12

Texas Constitution, Article 6, Section 3a 12

Utah Constitution, Article XIV, Section 3 12

Page

STATE STATUTES:

Alaska Statutes, Section 07.30.010 11

Arizona Revised Statutes:
Section 9-523 ..... 3, 6
Section 35-452 3
Section 35-454 ..... 4, 5, 6
Section 35-455 ..... 4, 6
Section 35-458 ..... 8, 13

Idaho Code:
Section 31-1905 11
Section 33-404 11
Section 50-1026 11

Louisiana Revised Statutes, Section 33:4251 et seq. 12

Revised Code of Montana:
Section 11:2306 12
Section 11:2404 12
Section 75:3908 12

New York Town Law, Section 84 12

New York Village Law, Section 4-402 12

Rhode Island Statutes, Section 16-3-11 12

OTHER AUTHORITIES:

28 U.S.C. Section 1253 2

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No.

CITY OF PHOENIX, ARIZONA, and MILTON H. GRAHAM, FRANK G. BENITES, CHARLES CASE, JOHN J. LONG, MILTON SANDERS, MRS. DOROTHY THIELKAS, DR. MORRISON F. WARREN, Members of and constituting the City Council of the City of Phoenix, Arizona,

Appellants,

versus

EMILY KOLODZIEJSKI,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

OPINION BELOW

The opinion of the three-judge district court has not yet been officially reported. A copy of that opinion is set forth in full in Appendix A.

JURISDICTION

This is an appeal from the judgment of a three-judge district court invalidating the following provisions of Arizona law insofar as they restrict elections to real property taxpapers who are qualified electors:

Article 7, Section 13, Arizona Constitution
Article 9, Section 8, Arizona Constitution
Title 9, Section 523, Arizona Revised Statutes
Title 35, Section 455, Arizona Revised Statutes

Both the constitutional and statutory provisions have general state-wide effect. This appeal is taken from the judgment of the lower court only insofar as it holds the foregoing provisions unconstitutional as applied to general obligation bond authorization elections. The lower court entered its judgment on December, 17, 1969. The notice of appeal was filed on December 19, 1969. A copy of the judgment from which the appeal is taken is set forth in full in Appendix B.

This court has jurisdiction by virtue of 28 U.S.C. Section 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Arizona Constitution, Article 7, Section 13

Submission of questions upon bond issues or special assesments

Questions upon bond issues or special assessments shall be submitted to the vote of real property tax payers, who shall also in all respects be qualified electors of this State, and of the political subdivisions thereof affected by such question. As amended, election Nov. 4, 1930, eff. Dec. 1, 1930.

Arizona Constitution, Article 9, Section 8

Local debt limits; assent of taxpayers

No county, city, town, school district, or other municipal corporation shall for any purpose become indebted in any manner to an amount exceeding four per centum of the taxable property in such county, city, town, school district, or other municipal corporation, without the assent of a majority of the property taxpayers, who must also in all respects be qualified electors, therein voting at an election provided by law to be held for that purpose, the value of the taxable property therein to be ascertained by the last assessment for State and county purposes, previous to incurring such indebtedness; except, that in incorporated cities and towns assessments shall be taken

from the last assessment for city or town purposes; Provided, that under no circumstances shall any county or school district become indebted to an amount exceeding ten per centum of such taxable property, as shown by the last assessment roll thereof; and Provided further, that any incorporated city or town, with such assent, may be allowed to become indebted to a larger amount, but not exceeding fifteen per centum additional, for supplying such city or town with water, artificial light, or sewers, when the works for supplying such water, light, or sewers are or shall be owned and controlled by the municipality. As amended, election Nov. 5, 1912, eff. Dec. 5, 1912.

Arizona Revised Statutes, Section 9-523

Bond election

Questions on bond issues under this article shall be submitted to the real property taxpayers who are in all other respects qualified electors of the municipality. No bonds shall be issued without the assent of a majority of the qualified electors voting at an election held for that purpose as provided in this article.

Arizona Revised Statutes, Section 35-452

Election to authorize indebtedness; qualifications of electors

A. The governing body or board of a political subdivision enumerated in § 35-451 may, and upon petition signed by fifteen per cent of its real property taxpayers who are qualified electors thereof shall, order an election by such taxpapers and electors to determine whether such indebtedness shall be authorized.

B. The order for the election in a school district shall be made by the board of supervisors in the county where such election will be held, either upon petition or upon request of the board of school trustees.

C. If a majority of the real property taxpayers who are qualified electors voting at the election vote in favor of creating an indebtedness in an amount exceeding four per cent of the value of the taxable property of the political subdivision, such political subdivision may become so indebted.

Arizona Revised Statutes, Section 35-454

Notice of order for election; election; return; canvass of vote; certificate of election

A. The governing body or board of the political subdivision shall:

1. Post at least five copies of the order for election in public places within the subdivision in which the election is to be held at least twelve days prior to the day of election.

2. Post a copy of the order at each polling place therein.

3. Publish a copy thereof in a newspaper for at least thirty days prior to the day of such election.

B. The election shall conform with the general election laws of the state. The return of the election held in a county or school district shall be made to the board of supervisors, and, in any other case to the governing body or board of the municipal corporation within twelve days after the election.

C. The board of supervisors, governing body or board shall hold a special meeting on the first Monday succeeding the twelfth day after the election to canvass the votes cast and certify the result. The certificate of the result shall be prima facie evidence of full performance of all conditions and requirements precedent to holding the election.

D. The governing board or body shall file and record in the office of the county recorder a certificate disclosing the purpose of the election, the total number of votes cast and the total number of votes for and against creating the indebtedness, and stating that the indebtedness is ordered. Upon filing and recording the certificate, the governing board or body shall carry out the purpose of the election.

Arizona Revised Statutes, Section 35-455

Issuance and sale of bonds; call for election

A. When the political subdivision designated in this article desires to issue bonds or other evidences of indebtedness, the

governing body or board thereof may, with assent of a majority of the real property taxpayers who are qualified electors therein voting at the election held as provided by § 35-454, issue and sell bonds in the amount authorized at the election.

The call for the election shall set forth the amount of each bond and the aggregate amount of the bonds, the rate of interest to be paid thereon not exceeding six per cent per annum, when the interest is payable, the date of maturity of the bonds and the purposes for which the money derived from the sale of the bonds will be expended.

QUESTION PRESENTED

Last term, in *Cipriano v. City of Houma*, 395 U.S. 701 (1969), this Court invalidated a Louisiana revenue bond election on the ground that only property taxpayers were allowed to vote. The question presented in the instant case is whether the holding in *Cipriano* applies to general obligation bonds, which, unlike revenue bonds, pledge the general ad valorem taxing power of the issuing body toward repayment of the bonds, and constitute an effective lien upon all taxable realty within the taxing district.

STATEMENT OF THE CASE

On June 10, 1969, the City of Phoenix, Arizona, submitted to the persons who under Arizona law are qualified to vote in bond authorization elections, ten separate proposed bonding issues. The first two of these propositions were for revenue bonds, $53,900,000 for the municipal water system, and $58,900,000 for the municipal airport and related facilities. The other eight proposed issues were general obligation bonds. The purpose and amounts of the general obligation bonds were as follows: Sewer system, $37,000,000; parks and playgrounds, $9,000,000; municipal buildings, $1,000,000; fire department, $1,200,000; police and public safety buildings, $4,500,000;

maintenance and service facilities, $1,500,000; sanitary land fills, $2,250,000; library, $4,000,000.

The constitutional and statutory provisions applicable to all bond authorization elections of incorporated cities and towns in the State of Arizona limit the right to vote in such elections to persons who are qualified electors and who are also real property taxpayers. Arizona Constitution, Article 7, Section 13; Article 9, Section 8. Arizona Revised Statutes, Section 9-523 and 35-455. These constitutional and statutory provisions apply to all political subdivisions within the State of Arizona, and not just to cities and towns.

The plaintiff in this case, Emily Kolodziejski, is a resident of the City of Phoenix and a qualified elector, but was not a real property taxpayer on June 10, 1969. Accordingly, she did not vote in the bond election held on that date.

All of the propositions submitted to the electorate on June 10, 1969, were approved by a majority of the persons voting in that election.

The decision of this Court in *Cipriano v. City of Houma*, 395 U.S. 701 (1969), was handed down on June 16, 1969, six days after the City of Phoenix bond election. One week later, on June 23, 1969, the City Council canvassed the result of the election pursuant to A.R.S. § 35-454 C, and certified that each issue had carried.

The appellee filed this action seeking a determination that all provisions of the constitution and statutes of the State of Arizona which require the ownership of property and the payment of taxes thereon as a condition of voting in bond authorization elections are in violation of the United States Constitution. The appellee also contended that the bond election held on June 10, 1969 was null and void, and sought injunctive relief against the issuance of any bonds authorized at that election.

The case was argued on the merits before a three-judge district

court on a stipulated statement of facts. The lower court filed its per curiam opinion and order on November 25, 1969. On December 17, 1969 the court entered its formal written judgment from which this appeal is taken. The appellants have agreed throughout these proceedings that under this Court's decision in *Cipriano v. City of Houma,* the authorizing election was invalid insofar as it relates to the two revenue bond measures. Accordingly, the sole issue in this case is whether the *Cipriano* decision applies to general obligation bonds.

THE QUESTION PRESENTED IS SUBSTANTIAL AND PROBABLE JURISDICTION SHOULD BE NOTED

Municipal bonds are the most important single source of long-term financing for cities, towns, and other municipal subdivisions, both in Arizona and also in many other states. Unavailability of a major segment of this most important source of long-term municipal financing, particularly for a vigorous, rapidly-expanding city like the City of Phoenix can materially impair the City's orderly development and its ability to provide for the legitimate needs of its citizens.

This Court clearly held in *Cipriano v. City of Houma,* 395 U.S. 701 (1969) that a state could not constitutionally limit the right to vote in revenue bond elections to real property owners. The opinion in that case correctly points out that "the benefits and burdens of [revenue bond issues] fall indiscriminately on property owner and nonproperty owner alike." 395 U.S. at 705.

The two principal prototypes of municipal financing obligations are revenue bonds, such as were involved in *Cipriano v. City of Houma,* and general obligation bonds, such as are at issue in this case. The *sine qua non* of general obligation bonds — and the single characteristic which distinguishes them from other bonds — is that the municipality which issues such bonds pledges its general ad valorem taxing power toward their repayment. Revenue bonds may be repaid either from the revenues

derived from the assets financed by the bonds — such as the electric facilities in *Cipriano* — or from some other source, so long as the general ad valorem taxing power of the issuing municipality is not pledged toward repayment. It is generally true that, other things being equal, general obligation bonds can be marketed on terms more favorable to the issuing entity than non-general obligation bonds.

General obligation bonds, therefore, unlike revenue bonds, effectively place a lien for the life of the bonds on all taxable realty located within the confines of the issuing municipality. Arizona Revised Statutes, Section 35-458 provides as follows:

> *"Levy of tax for payment of interest and bonds*
>
> A. After the bonds are issued, the governing body or board shall enter upon its minutes a record of the bonds sold, their numbers and dates, and shall annually levy and cause to be collected a tax, at the same time and in the same manner as other taxes are levied and collected upon all taxable property in such political subdivision, sufficient to pay the interest on the bonds when due, and shall likewise annually levy a tax sufficient to redeem the bonds when they mature.
>
> B. Monies derived from the levy of the tax when collected shall constitute a fund for payment of interest and the bonds. The fund shall be kept separately and shall be known as the 'Interest Fund' and 'Redemption Fund.'"

Thus, during the entire life of the bond, the realty of the real property taxpayer is irrevocably burdened by the pledge — and the statutory obligation — of the municipality to utilize its taxing power for the purpose of repaying the bond obligation. The property belonging to non-taxpaying electors is subject to no comparable burden. In *Baker Watts & Co. v. Saxon*, 261 F. Supp. 247, 252 (D.DC. 1966) the United States District Court for the District of Columbia observed as follows:

> "While there is a paucity of judicial authorities on the subject, it was held by the Supreme Court of Oregon, in City of Eugene v. Willamette Valley Co., 52 Or. 490, 97 P. 817,

821, that the phrase 'general obligations' means, 'a municipal debt, for the payment of which provision must be made by devoting funds raised by taxation, thereby appropriating in discharge thereof a pro rata share of the burden upon all property in a specified district that is subject thereto.' No authorities have been cited to the contrary."

The constitutionality of limiting the franchise in general obligation bond authorization elections to those whose property will be taxed in order to repay the bonds was neither raised nor decided by *Cipriano.* As a result of the holding in *Cipriano,* however, municipalities both in the State of Arizona and in other states having similar constitutional and statutory provisions have found themselves in this dilemma:

1. If the *Cipriano* holding applies to general obligation bonds, then the United States Constitution invalidates any bond authorization election at which nonproperty owners were excluded from voting.

2. If the *Cipriano* holding does not apply to general obligation bonds, then the respective state constitutions invalidate general obligation bond authorization elections at which nonproperty owners were allowed to vote.

Within Arizona and states having similar constitutional limitations on voting in bond elections, therefore, it is impossible to hold any general obligation bond election confident that it will not violate either (1) the Fourteenth Amendment because non-property owners were not allowed to vote, or (2) applicable state constitutional provisions, because non-property owners were allowed to vote. As a consequence, until the issue of *Cipriano's* applicability or nonapplicability to general obligation bond elections has been settled by this Court, municipal financing through general obligation bonds in Arizona has come to a complete halt.

The predicament of the City of Phoenix is representative. The bond election of June 10, 1969 was held because of ten specific anticipated needs of the City of Phoenix. These needs still exist. It is imperative that an answer be provided forthwith

concerning *Cipriano's* applicability to general obligation bonds, so that the City of Phoenix, like many others, can either proceed to sell the bonds which its voters have approved, or provide whatever corrective is indicated in light of this Court's decision.

Of the ten issues approved by the voters at the June 10, 1969 election, two involved revenue bonds and the remaining eight involved general obligation bonds. The City does not seek reversal of the trial court's determination that the election was void as to the revenue bonds. Accordingly, the City knows that it must take some other steps to finance its proposed water system and airport improvements.

As to the eight measures calling for issuance of general obligation bonds, *Cipriano's* applicability has not been resolved. The improvements which were to be financed by these bonds — extension of the sewer system, construction of parks and playgrounds, municipal buildings, fire department, police and public safety buildings, maintenance and service facilities, land fills and libraries — are still needed. In some instances, the need is urgent. The City has determined that the necessary facilities are to be financed by the authorization, sale and issuance of general obligation bonds. *Cipriano's* applicability or nonapplicability to general obligation bonds must be resolved in order that the City of Phoenix can proceed either to sale and issuance of the bonds which its voters have already approved, or whether it must hold another election, and perhaps obtain changes in relevant constitutional and statutory provisions.

This is, therefore, one of those cases in which it is imperative that the Court rule. Whether the ruling is in favor of the appellants or the appellee is not nearly so important as is the fact of the ruling itself. If state constitutional and statutory provisions are valid with regard to general obligation bonds, they must, of course, be followed. If they are violative of the Fourteenth Amendment, they cannot be followed. Unable to steer

between the Scylla of Arizona's State Constitution and the Charybdis of the Fourteenth Amendment, municipalities in the State of Arizona have simply stopped holding general obligation bond elections until *Cipriano's* applicability or nonapplicability to such elections is established.

The problem has practical, as well as legal underpinnings. Municipal bonds are unmarketable so long as there is in existence a substantial unresolved question concerning their legality.

We suspect that other states have encountered similar problems. Arizona is not unique in restricting bond authorization elections to property owners. Thirteen additional states — eleven of them by constitutional provision and two by statute — have provisions limiting bond election voting to taxpayers or property owners. These states, and their relevant provisions, are set forth in the following table.

Municipalities, Counties and School Districts Limiting Bond Election Voters to Taxpayers or Property Owners

State	*Authority*	*Issuer*	*Type*
Alaska	Alaska Statutes §07.30.010	Boroughs (including all school and other districts outside of cities)	All
Arizona	Constitution, Article 7, §13	All	All
Colorado	Constitution, Article XI, §§6, 7 and 8	All	General Obligation
Florida	Constitution 1885, Article 9, §6, Constitution 1969, Article 7, §12	All	General Obligation
Idaho	Constitution, Article 8, §3, I.C. §§50-1026, 31-1905, 33-404	All	General Obligation

Louisiana	Article XIV, §14(a) R.S. 33:4251 et seq.	All	General Obligation Revenue (without mortgage)
Michigan	Constitution, Article II, §6	All	General Obligation
Montana	Constitution, Article IX, §2, Article XIII, §5, R.C.M. §§11:2306, 11:2404, 75:3908	All	All
New Mexico	Constitution, Article IX, §§10, 11 and 12	All	General Obligation
New York	Town Law, §84, Village Law §4-402	Towns Villages	General Obligation
Oklahoma	Constitution, Article X, §27	Cities Towns	All but streets, highways and limited access facilities
Rhode Island	Constitution, Article XXIX, §2; Rhode Island Statutes, §16-3-11	Towns Regional School Districts	All
Texas	Constitution, Article 6, §3a	All	General Obligation
Utah	Constitution, Article XIV, §3	All	General Obligation Revenue Bonds (except for new construction or payable from special allocation)

The instant case in the first in which a three-judge district court has passed upon this important issue. The eyes of the municipal financing community in fourteen states are, therefore, trained upon this case. There has been at least one other decision squarely on point by a court of record, and the holding in that case is in square conflict with the holding of the lower court in this case. *Dorris Handy, Jr. v. Parish School Board of Parish of Acadia,* No. 31,923, Fifteenth Judicial District Court, Parish of Acadia,

Louisiana (November 19, 1969), held that *Cipriano* does not apply to general obligation bond elections. Because of the direct conflict between the two decisions, a copy of the opinion in the Louisiana case is set forth in full in Appendix C.

It is well settled that one of the most important factors to be taken into consideration in determining the substantiality of federal questions presented to this Court on appeal is a conflict among the lower courts on the precise question presented. While the conflict in this case does not involve the United States Courts of Appeal nor State Supreme Courts, the conflict is nonetheless real, and reflects the growing concern over this issue among lower courts that have had to deal with it. Significantly, the conflict developed within less than six months after *Cipriano* was handed down.

It is respectfully submitted that the *Cipriano* ruling should not extend to general obligation bonds. The security for such bonds is the pledge by the municipality that it will exercise its property taxing power to repay the bonds. A.R.S. §35-458. It follows that a state has not acted outside its permissible bounds in prescribing that the decision whether property owners are to be taxed for the purpose of repaying the bonds should be left to those who are to be taxed.

The possibility of such distinction appears to have been anticipated by the *Cipriano* opinion. That opinion recognizes and assumes *arguendo* "that a state might, in some circumstances, constitutionally limit the franchise to qualified voters who are also 'specially interested' in the election. . . ." 395 U.S. at 704.

If the "specially interested" limitation includes anything at all, it must include real property taxpayers in a general obligation bond election. Considering the entire spectrum of voters and potential voters in municipal bond authorization elections, there is no group which could as appropriately quality for the specially interested designation as real property taxpayers in a general obligation bond election.

At the very least, this much is clear: If a "specially interested" limitation is to be recognized — as we feel it should — the dividing line must be drawn between those instances in which the municipality pledges its property taxing power and those in which it does not. If there is any exception at all to the *Cipriano* rule, it must include general obligation bond elections; there is no more clear example of voters being specially interested in the outcome of a bond election than voters whose property is to constitute the source of funds for repayment of the bonds.

That the "specially interested" exception anticipated a distinction between general obligation bonds and other bonds is further strengthened by the following language in the *Cipriano* opinion:

> "The revenue bonds are to be paid only from the operations of the utilities; they are not financed in any way by property tax revenue. Property owners, like nonproperty owners, use the utilities and pay the rates; however, the impact of the revenue bond issue on them is unconnected to their status as property taxpayers. Indeed, the benefits and burdens of the bond issue fall indiscriminately on property owner and nonproperty owner alike." 395 U.S. at 705.

The importance of review by this Court is magnified in the instant case by the fact that unless the lower court's holding is reviewed by this Court, there will be no appellate review at all. The issue in this case — lying as it does at the very heart of municipal financing in more than one fourth of the states — is far too important for the holding of the district court to be both the first and the last word on the matter. A question of this magnitude deserves at least one appellate review.

Finally, it is respectfully submitted that this is a case which not only needs to be decided by this Court, but needs to be decided this term. In the case of the City of Phoenix, even if this appeal is decided by the Court this term, the City's bonding program will be at least one year behind schedule. Inevitably, there

are many other municipalities for whom the urgency is equally great. Accordingly, appellants would have no objection — and indeed request — that the Court note probable jurisdiction, set the case down for argument during the 1969 term, and shorten the time for filing briefs so as to permit argument during this term. Toward that end, appellants represent to the Court that, if necessary, they will file their merits brief within as short a period of time as three weeks from the date of the Court's order noting probable jurisdiction.

While the proposed procedure is somewhat out of the ordinary, we are dealing here with an extraordinary problem.

CONCLUSION

This is the first case to reach this Court raising the question whether the Court's holding in *Cipriano v. City of Houma* applies to general obligation bonds. The decision is in conflict with at least one other holding by a state court.

Pending resolution of the issue in this case, municipal financing in Arizona through general obligation bonds has come to an absolute standstill. We suspect that other states with similar constitutional provisions face similar problems. Municipalities within these states find themselves on the horns of a constitutional dilemma: If *Cipriano* applies to general obligation bonds, it is unconstitutional to prevent nonproperty taxpaying electors to vote; if *Cipriano* does not apply, then it is unconstitutional to permit them to vote. The only solution is for the Court to make a determination so that municipalities within these states can adopt whatever correctives may be necessary, and resume their orderly growth patterns through bond financing which comports with applicable constitutional requirements.

Whatever the answer, it must be forthcoming without delay.

Respectfully submitted.

ROBERT J. BACKSTEIN
City Attorney
City of Phoenix

By ALLEN K. POLLEY
Assistant City Attorney
Municipal Building
Phoenix, Arizona

REX E. LEE
Special Counsel
111 W. Monroe
Phoenix, Arizona 85003

Attorneys for Appellants.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

EMILY KOLODZIEJSKI,
Plaintiff,
vs.
CITY OF PHOENIX, ARIZONA, and MILTON H. GRAHAM, FRANK G. BENITES, CHARLES CASE, JOHN J. LONG, MILTON SANDERS, MRS. DOROTHY THEILKAS, DR. MORRISON F. WARREN, Members of and constituting the City Council of the City of Phoenix, Arizona,
Defendants.

No. Civ-69-335 Phx.

OPINION AND ORDER

Before: Walter Ely, Circuit Judge, and Walter E. Craig and Wm. P. Copple, District Judges

PER CURIAM:

The above entitled cause was instituted pursuant to Title 42 U.S.C. Section 1983, Title 28 U.S.C. Section 1343 (3) (4), and Title 28 U.S.C. Sections 2201 and 2202.

Plaintiff, a resident of the City of Phoenix, within the District of Arizona, seeks to enjoin the City of Phoenix, a body politic, the Mayor and members of the City Council, from issuing certain bonds approved at a special election June 10, 1969, called for that purpose. The election was duly and regularly called by the City, pursuant to Article 7, Section 13 of the Arizona Constitution, and Title 9, Section 781, A.R.S.[1] (35-452).

[1] Article 7, Section 13, Constitution of Arizona: "Questions upon bond issues or special assessments shall be submitted to the vote of real property tax payers, who shall also in all respects be qualified electors of this state,

The propositions offered to the electorate were ten in number, the first two related to Revenue Bonds: (1) for the Municipal Water System, $53,900,000, (2) for the Airport and related facilities, $58,900,000. The remaining eight propositions related to General Obligation Bonds: (3) Sewer System, $37,000,000, (4) Parks and Playgrounds, $9,000,000, (5) Municipal Buildings, $1,000,000, (6) Fire Department, $1,200,000, (7) Police and Public Safety Buildings, $4,500,000, (8) Maintenance and Service Facilities, $1,500,000, (9) Sanitary Landfills, $2,250,000, (10) Library, $4,000,000.

Pursuant to the Arizona Constitution and Statutes, the electorate was limited to duly qualified electors who, in addition, were real property taxpayers. Plaintiff is a duly qualified elector of the City of Phoenix, but not a real property taxpayer.

The canvass of the election took place June 23, 1969, and the several propositions were declared to be carried. Under Arizona law the period during which an elector may contest an election is limited to five (5) days following the canvass of the election and the declaration of the results thereof. 16 A.R.S. 1202, 1204.

This action was instituted August 1, 1969, in this Court, no State action having been instituted. A Three Judge Court was convened to hear the matter, pursuant to Title 28 U.S.C. Sections 2281 and 2284. The matter was submitted and argued to the Court upon an agreed Statement of Facts consistent with the foregoing statement.

We need go no further than *Kramer v. Union Free School Dis-*

and of the political subdivisions thereof affected by such questions."

Title 9, Section 782, A.R.S.: "When the governing body of an incorporated city or town determines to borrow money under the provisions of this article, the question of issuing bonds under this article shall be submitted to the real property taxpayers who are in all other respects qualified electors of the municipality. No bond shall be issued without the assent of a majority of such qualified electors voting at an election held for that purpose as provided in this article."

trict, 395 U.S. 621, 89 S.Ct. 1886, and *Cipriano v. City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, both decided June 16, 1969.

In *Kramer, supra*, the Supreme Court has held that State Statutory and Constitutional provisions prohibiting the exercise of the voting franchise to some electors, while allowing it to others, must be subjected to close scrutiny to "determine whether the exclusions are necessary to promote a compelling State interest." If there is no compelling State interest to be promoted by the exclusion, the Constitutional and Statutory provisions are violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

As in *Cipriano, supra*, we find the challenged Constitutional provision and the challenged Statutes under which the election was held to contain "a classification which excludes otherwise qualified voters, who are as substantially affected and directly interested in the matters voted upon as those permitted to vote." There was no evidence before this Court which would justify the conclusion that the exclusions under Arizona law are necessary to promote a compelling State interest. Moreover, in the instant case we find no evidence which would justify a distinction between Revenue Bonds and General Obligation Bonds.[2]

In *Cipriano, supra*, in order to avoid significant hardships on cities' bondholders and others, the Court held the rule of that case would be applied prospectively, "only where, under state law, the time for challenging the election result has not expired, or in cases brought within the time specified by state law for challenging the election and which are not yet final. Thus, the decision will not apply where the authorization to issue the securities is legally complete on the date of this decision.

In the instant case the authorization to issue the securities was

---

[2] The defendants concede that *Kramer* and *Cipriano* require that the election be invalidated insofar as it authorized the issuance of Revenue Bonds.

not legally complete by June 16, 1969, (the date of the *Cipriano* decision) nor had the time expired within which the election could have been contested. In the instant case we find the Arizona Constitutional and Statutory exclusions involved in the election called by the City of Phoenix and held June 10, 1969, to be violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

IT IS ORDERED that the defendants will be permanently enjoined from the issuance of any securities purportedly authorized by the challenged election, and the plaintiff's counsel will submit a proposed form of judgment.

DATED this 17th day of November, 1969.

WALTER ELY
United States Circuit Judge
WALTER E. CRAIG
United States District Judge
WM. P. COPPLE
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

EMILY KOLODZIEJSKI, Plaintiff, vs. CITY OF PHOENIX, ARIZONA, and MILTON H. GRAHAM, FRANK G. BENITES, CHARLES CASE, JOHN F. LONG, MILTON SANDERS, MRS. DOROTHY THEILKAS, DR. MORRISON F. WARREN, members of and constituting the City Council of the City of Phoenix, Arizona, Defendants.	NO. Civ-69-335-PHX. JUDGMENT

The Plaintiff's Motion for Preliminary Injunction having been scheduled for argument the 31st day of October, 1969, and the parties having stipulated that all merits of the case be submitted for final determination at the date set for oral argument, and the Court being fully advised in the premises and the Court having heretofore entered its OPINION AND ORDER.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that Article 7, Section 13, Arizona State Constitution; Article 9, Section 8, Arizona State Constitution; Title 9, Section 523, Arizona Revised Statutes; and Title 35, Section 455, Arizona Revised Statutes; are violative of the 14th Amendment of the United States Constitution insofar as said sections of the Constitution of the State of Arizona and statutes of the State of Arizona restrict elections to real property taxpayers who are qualified electors of the subdivision.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the special election held on June 10, 1969, pursuant to City of Phoenix Ordinance #S-4747, be declared, and the same is declared, to be null and void and have no force and effect.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all of the above captioned defendants, their successors, agents, or attorneys be and they are permanently enjoined from taking any further action to sell or issue any bonds purportedly authorized by the special bond election held on June 10, 1969.

DATED: This ..... day of December, 1969.

.....
United States Circuit Judge

.....
United States District Judge

.....
United States District Judge

APPROVED AS TO FORM:

ROBERT BACKSTEIN

ALAN K. POLLEY
Assistant City Attorney

APPENDIX C

DORRIS HANDY, JR. VERSUS PARISH SCHOOL BOARD OF THE PARISH OF ACADIA	FIFTEENTH JUDICIAL DISTRICT COURT NUMBER: 31,923 PARISH OF ACADIA, LOUISIANA

REASONS FOR JUDGMENT

This is a suit by a registered voter qualified to vote in the Parish of Acadia who resides in but does not own real or immovable property or other property subject to ad valorem taxation in Crowley School District No. 2 of Acadia Parish, Louisiana, against the Parish School Board of the Parish of Acadia, the governing authority of said school district. Plaintiff seeks to have an election which was held in the School District on April 22, 1969, authorizing the incurring of debt and issuance of $3,125,000.00 of general obligation bonds of said School District, declared null and void, in contravention of the Equal Protection Clause to the Fourteenth Amendment of the United States Constitution, and further seeks to enjoin the defendant from issuing, offering for sale and/or selling the aforesaid bonds, and from enforcing, executing, administering or in any way giving effect to the provisions of the Constitution and Statutes of the State of Louisiana which have the effect of requiring ownership of property and the payment of taxes thereon as a condition of voting in general obligation and elections in the State. Plaintiff further prays that he and all registered voters in Crowley School District No. 2 of Acadia Parish be declared eligible to vote in all general obligation bond elections held in said School District pursuant to the general election laws of the State. Defendant has filed peremptory exceptions of prescription, no right and no cause of action and, reserving its rights under said exceptions, has answered the petition. Prior to the date fixed for the hearing of the preliminary injunction, counsel for plaintiff and defendant entered

into a stipulation that the trial of the preliminary and final injunction be tried and decided at the same time, and further stipulated that the entire matter should be tried on the pleadings and exhibits attached thereto, and be submitted to the Court on briefs of counsel for both parties without oral argument.

The facts as shown in the pleadings and evidence submitted show that on March 3, 1969, the Parish School Board of the Parish of Acadia, the governing authority of Crowley School District No. 2 of Acadia Parish, Louisiana, adopted a resolution calling a special election to be held in said School District to authorize the incurring of debt and issuance of general obligation bonds of said School District to the amount of $3,125,000.00. The election was held as called on April 22, 1969, and the proceedings adopted by the defendant on April 24, 1969, canvassing and promulgating the votes cast at said special election were duly published in a newspaper within the School District as well as in the official journal of said School Board. The date of publication in the newspaper published within the School District was May 9, 1969 and there was full compliance with the provisions of R.S. 39:515. The results of the election indicate that 417 votes representing an assessed valuation of $1,311,156.00 were cast in favor of the proposition and 224 votes representing an assessed valuation of $559,568.00 were cast against said proposition.

The election was called pursuant to the provisions of Article XIV, Section 14(a) of the Louisiana Constitution as well as Part II and Sub-Part A of Part III, Chapter 4, Title 39 of the Louisiana Revised Statutes of 1950. This constitutional provision and the provisions of R.S. 39:508 specifically provide that only property taxpayers qualified as electors under the constitution and laws of this State are entitled to vote in such an election. Plaintiff, being a qualified elector but not a property taxpayer, was not permitted or entitled to vote in said election under the aforesaid constitutional and statutory provisions. In his petition, plaintiff

further avers that the defendant contemplates and intends to call further elections for the issuance of general obligation bonds under these identical constitutional and statutory provisions permitting only property taxpayers qualified as electors to vote, which is admitted by the defendant, and seeks to enjoin defendant from calling any future elections under said authority on the basis that these Louisiana constitutional and statutory provisions discriminate against plaintiff and others similarly situated, depriving them of their rights, privileges and immunites under the Equal Protection Clause to the Fourteenth Amendment of the Constitution of the United States. In attacking the constitutionality of the Louisiana constitutional and statutory provisions, plaintiff relies on several cases of the United States Supreme Court and particularly the recent cases of *Kramer v. Union Free School District,* 395 U.S. 621, 89 S.Ct. 1886 (1969); *Cipriano v. City of Houma,* 395 U.S. 701, 89 S.Ct. 1897 (1969); and *Harper v. Virginia Board of Elections,* 383 U.S. 663, 86 S.Ct. 1079 (1966).

In the *Kramer* case the United States Supreme Court voided a New York statute which excluded from the electorate in school district elections certain electors who were otherwise eligible to vote in state and federal elections. Under the New York statute, to be eligible to vote at an annual school district meeting an otherwise qualified (citizenship and age) district resident must have been either (1) the owner or lessee of taxable real property located in the district, (2) the spouse of one who owns or leases qualifying property, or (3) the parent or guardian of a child enrolled for a specified time during the preceding year in a local district school.

The *Cipriano* opinion extended the *Kramer* decision to revenue bond elections. It held that the provisions of Louisiana law which limited to property taxpayers the right to vote in revenue bond elections violated the Equal Protection Clause of the federal constitution. In declaring unconstitutional the Virginia poll tax, the

United States Supreme Court in the *Harper* case declared: "that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard."

Relying on these decisions, plaintiff attacks the provisions of the Louisiana constitution and statutes requiring a taxpayers election in general obligation bond elections on the basis that such constitutional and statutory provisions which have the effect of excluding all qualified voters except registered property taxpayers are not exclusions which are necessary to promote a compelling state interest; that the interest of the property taxpayer in general obligation bond elections is no more substantial or greater than the registered voter who does not own real property or other property subject to ad valorem taxation in the State, in that:

(a) In most instances the property owner in the State of Louisiana residing in his property pays no taxes whatsoever or only a small portion thereof in view of the veteran's exemption and homestead exemption afforded such owners of real property and the taxes levied or assessed against such property are in fact paid out of the general revenues of the State of Louisiana, and, consequently, payable by all of the citizens and business enterprises in the State who pay taxes;

(b) The requirement that the proposition be approved by a majority of property taxpayers in number and amount represents a dilution of the weight of a citizen's vote in that the vote of property owners who have a large assessment is more effective and carries a greater weight than those property owners with lesser assessed valuations;

(c) Non-resident property taxpayers and legal entities such as corporations, associations and partnerships who own real property but are not otherwise qualified to vote, pay a substantial or majority share of ad valorem taxes in the Parish, but because of their corporate and partnership status and non-residency qualification cannot participate in the election under any circumstance; and

(d) Registered voters who do not own real property in the School District are substantially interested in and significantly affected by the School Board's decisions. All members of the community have an interest in the quality and structure of public education and decisions submitted to only one class of citizens who own real property may have grave consequences to the entire population. Further, the level of property taxation affects every citizen as property tax levels affect the price of goods and services in the community.

The prayer of plaintiff is several fold: First, plaintiff prays that the election held in the School District on April 22, 1969, be declared null and void, in contravention of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; second, that the defendant, all of the members thereof, their agents, servants and employees, be restrained, enjoined and prohibited from issuing, offering for sale and/or selling the bonds authorized at said election; third, that defendant be further enjoined from enforcing, executing, administering or in any manner giving effect to the provisions of the Louisiana constitution and statutes which have the effect of requring ownership of property and the payment of taxes thereon as a condition of voting in general obligation bond elections; and fourth, that petitioner and all registered voters in the School District be entitled to vote in all general obligation bond elections held in said School District under the general election laws of the State of Louisiana.

The peremptory exceptions of defendant rely in part on the provisions of Article XIV, Section 14(n) of the Louisiana Constitution and R.S. 39:518. The answer of defendant substantially admits the factual allegations hereinabove enumerated but denies that the provisions of the Louisiana constitution and statutes which require ownership of property and the payment of taxes as a condition of voting in general obligation bond elections are

repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States Contsitution.

In opposition to plaintiff's attack on the election held in Crowley School District No. 2 of Acadia Parish on April 22, 1969, defendant has filed peremptory exceptions of prescription, no right and no cause of action. Defendant cites and relies on Article XIV, Section 14(a) of the Louisiana Constitution and R.S. 39:518, the pertinent language of which specifically recites that no court shall have authority to inquire into the validity of any election or the authority to issue bonds after sixty days have run from the date of promulgation of the election results. The undisputed facts of this case reveal that the election results of the School District election were promulgated and published on May 9, 1969, in accordance with the provisions of R.S. 39:515 requiring the publication in a newspaper published in the subdivision, or if there is none, in a newspaper published in the Parish. Plaintiff's suit was filed more than sixty days after the date of the publication of the promulgation and Article XIV, Section 14(n) of the Louisiana Constitution and R.S. 39:518 operate as a complete extinguishment of the right to attack the election. *Andrieux v. East Baton Rouge Parish School Board, et al,* Docket Number 50,160 of the Supreme Court of Louisiana.

As regards the constitutionality of the provisions of Article XIV, Section 14(a) of the Louisiana Constitution and R.S. 39:508 which limit the franchise in general obligation bond elections to only property taxpayers qualified as electors under the constitution and laws of this State and require that the proposition submitted be carried by a majority in number of votes and assessment voted, this Court is constrained to hold that such provisions are not in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The United States Supreme Court still recognizes that under certain circumstances a state might limit the exercise of the vot-

ing franchise to those "primarily interested" or "primarily affected." If a state statute grants the right to vote in a limited purpose election to some otherwise qualified voters and denies it to others, the statute does not violate the federal constitution if the exclusions are necessary to promote a compelling state interest. This Court is in agreement with the following provisions of Judge Parker's district court decision in the *Andrieux* case:

> "Since the first appearance in Louisiana of constitutional authorization to vote public debt secured by ad valorem taxation, the right to vote has been delegated to property owning qualified electors. Such citizens must vote affirmatively, not only in number of votes cast but in assessed valuation. The assessed valuation is based on the last completed tax roll against which, in the following years, such ad valorem taxes would be computed and allocated. The Constitution of 1921 was drafted and put into effect as authorized by Act 180 of 1920 adopted by the qualified electors of the State at an election held November 2, 1920. A provision similar to the requirement of Article 14, Section 14(a) (qualified taxpaying voters) was contained in the previous Constitution in effect of date 1898.
>
> "In the CIPRIANO case, supra, there was no direct connection as here found between the proposition voted on and the obligation to pay. The franchise here is limited to those qualified voters who are 'specially interested' in the election which can result in the imposition of a tax specially calculated to be paid by such voting classification. The rational basis for the qualification here is that imposition of the tax must be authorized by a vote of the payers of the tax. In determining whether the exclusion here is necessary to promote a compelling State interest, this Court has taken note of the nature of the tax, the manner of the imposition thereof, the procedure for the collection, the right to seize and sell the taxpayer's property in the event of a failure to pay. The obligation to and the consequent liability for non-payment is solely that of the property owner. If for some reason he is unable to pay the tax, he will suffer the penalties imposed by law. His property will be the subject of seizure and tax sale.
>
> "This Court is also aware that Louisiana law requires that 'all property situated within the state . . . shall be subject to

taxation' (except such as is expressly exempted) (L.R.S. 47:1951.) Article 10 provides exemptions for automobiles, household furniture, private libraries, musical instruments, drapes and rugs as well as other movable furnishings in the house. Other movable items of property owned by citizens are not subject to these exemptions. Under L.R.S. 47:1956, each citizen is required to fill out a list of his taxable property including movable property not exempt, make oath to its correctness and return such list to the Parish Assessor. Most qualified electors meeting the residence requirements of Article 8, Section 1 (one year) would have accumulated at least some personal or movable property subject to assessment, taxation and the required filing of the list under the above cited statute.

"It would seem that these decisions of the United States Supreme Court open the door wide as to the validity of a property tax election, for certainly if there is a case where the primary interest of the election is to be taken into account, it would be in a property tax election of the kind here involved."

For the reasons hereinabove cited, this Court does not have authority to inquire into the validity of the election held in Crowley School District No. 2 of Acadia Parish on April 22, 1969, or of the authority of the defendant board to issue the bonds authorized by the election and inasmuch as the provisions of the Louisiana Constitution and statutes which limit the voting franchise in general obligation bond elections do not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the plaintiff is not entitled to the injunctive relief which he seeks in these proceedings and there is no necessity for this Court to pass upon whether the general election laws of Louisiana would apply if it is finally determined that the general obligation bond election provisions of Louisiana are unconstitutional.

Costs of these proceedings are to be paid by plaintiff. An appropriate judgment will be signed upon presentation. Lafayette, Louisiana, this 19th day of November, 1969.

LUCIEN P. BIRTIONAL, JR.
District Judge